SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 13 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 93

NOAH GRIMES AND ALICE THOMAS PEARSON,

Petitioners

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

W. O. COOPER, JR.
204 Southern United Building
Macon, Georgia
Counsel for Petitioners

I N D E X.

	PAGE
Opinion Below----------	1
Appendix A, Opinion of Circuit Court of Appeals for Fifth Circuit---------	2
Appendix B, Judgment----------	5
Appendix C, Order Denying Motion for a Rehearing-------	7
Jurisdiction----------	8
Questions Presented----------	8
Statutes Involved----------	12
Statement of the Case----------	13
Statement of Facts----------	14
Reasons for Granting Writ---------	24

C I T A T I O N S

Rabinowitz and Jackson vs. United States, 366 Fed 2nd 35----------	10,15, 16,26,27,29,
Taylor vs. United States, 286 US 466----------	24,
Walker vs. United States, 225 Fed 2nd(5), 447----------	25
Walker vs. United States, 125 Fed 2nd (5) 395----------	26

CITATIONS (Continued)

	PAGE
Wakkuri vs. United States, 67 Fed 2nd 844----------	26
Roberson vs. United States, 165 Fed 2nd 752----------	26
Thiel vs. Southern Pacific, 328 US 217-220----------	27,28
Glassner vs. United States, 315 US 60, 83, 87----------	28
Ballard vs. United States, 329 US, 187-195----------	28

S T A T U T E S

28 USC 1861----------	11,12,13, 16,17,18,
28 USCA, Section 1254(1)---------	8,12,30

CITATIONS (Continued)

PAGE

Wakkuri vs. United States, 67
Fed 2nd 844---------- 26

Roberson vs. United States, 165
Fed 2nd 752---------- 26

Thiel vs. Southern Pacific, 328
US 217-220---------- 27,28

Glassner vs. United States, 315
US 60, 83, 87---------- 28

Ballard vs. United States, 329 US
187-195---------- 28

S T A T U T E S

28 USC 1861---------- 11,12,13,
16,17,18;

28 USCA, Section 1254(1)---------- 8,12,30

IN THE SUPREME COURT OF THE UNITED STATES

_____Term, 1968

NOAH GRIMES and ALICE THOMAS PEARSON,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JUDGMENT AND OPINION OF THE COURTS BELOW

The judgment of the United States District Court for the Middle District of Georgia, Macon Division, was entered on the 20th day of April, 1967, as to Petitioners Noah Grimes on Alice Thomas Pearson, and is not reported, but is printed in the record filed with the Clerk of the United States Court of Appeals for the Fifth Circuit as to Noah Grimes (R. pp. 217-218) and as to Alice Thomas Pearson (R. pp. 218-219). The opinion of the United States Court of Appeals for the Fifth Circuit affirming said judgment was filed on March 20, 1968, and is not yet reported but is set forth in the Appendix hereto.

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 24733

NOAH GRIMES AND THOMAS PEARSON,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(March 20, 1968)

Before WISDOM, BELL and DYER, Circuit Judges.

PER CURIAM: Appellants were convicted of possessing non-tax paid whiskey in violation of 26 USCA, §§ 5205 (a)(2) and 5604(a). They contend that the whiskey was unconstitutionally seized and that the grand

and petit juries which considered their cases were illegally constituted.

The whiskey was seized by federal agents without a search warrant. The dispute centers on the location of the whiskey. It was found in a wooded area on land owned by appellant Grimes and behind a house which he occupied. The question presented is whether this location was within the curtilage of his home. The District Court considered the matter on a motion to suppress. His factual determination that the whiskey was outside the curtilage is not clearly erroneous.

The proof indicates that the jury list in the Macon Division was revised on the basis of a random selection of names from voter registration lists. Cf. United States v. Tillman, N.D. Ga., 1967, 272 F. Supp. 908, for a similar system. The proof was that the result of the revision was an array which is a representative cross-section of the community.

Appellants contend, however, that the use of voter registration lists as the sole source of names for jury duty is illegal. There was no showing that the use of these lists resulted in the exclusion of a "cognizable group or class of citizens." Rabinowitz v. United States, 5 Cir., 1966, 366 F.2d 34, 57, n. 57. See also United States v. Kelly, 2 Cir., 1965, 349 F.2d 720, 778; Chance v. United States, 5 Cir., 1963, 322 F.2d 201, 203. A group of persons who have failed to register to vote has never been considered to constitute

a "cognizable group." United States v. Kelly, supra; Chance v. United States, supra; Gorin v. United States, 1 Cir., 1963, 313 F.2d 641, 644.

The other ground asserted is that improper care was exercised by the jury commissioner and clerk in the compilation of the jury list in carrying out the statutory command of 28 USCA, §1861, that jurors be able to read, write, speak and understand the English language. This ground fails for want of proof.

AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1967

NO. 24733

D. C. Docket No. CR 8425

NOAH GRIMES and THOMAS PEARSON,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before WISDOM, BELL and DYER, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was taken under

submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

March 20, 1968

Issued as Mandate:

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 24,733

NOAH GRIMES and THOMAS PEARSON,

Appellants

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court for the Middle District of Georgia

---

(April 12, 1968)

(On Petition for Rehearing)

Before WISDOM, BELL, and DYER, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and number cause be, and the same is, hereby DENIED.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction of this Court is invoked under 28 U.S. Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

QUESTION 1.

Relating to Motion to Suppress the Evidence

Did the Court of Appeals err in affirming the Judgment of the District Court in declining and refusing to suppress and exclude the testimony of Government Agents W. W. Williams and Roger M. Brown relating to the search and seizure of contraband whiskey from the premises of Petitioner Noah Grimes in the absence of a search warrant or arrest warrant and agents admittedly stated they had ample time and opportunity to obtain a search warrant and also admitted that the premises in question were within the curtilage of Petitioner Noah Grimes' home. (R. p.58.)

Relating to the finding of the whiskey within the curtilage or premises of the petitioner's home, it is definitely shown by the government agent that the whiskey was found in a ditch immediately off the petitioner's private road that led from his home to his garage and garden site. (R. pp. 46, 47, 48, 49.)

Further relating thereto, the garage of Petitioner Grimes was 110 yards from his home. The whiskey was found between his home and the garage. The garage was within the curtilage of petitioner's home. (R.p. 58.) The whiskey site was seventy (70) yards from his home. The garage was 40 yards below the whiskey site. (See ruling of the District Court on Motion to Suppress.) (R. pp. 61, 62, 63.)

Opinion (Per Curiam). United States Court of Appeals Fifth Circuit upon this question being presented, held as follows:

> "The whiskey was seized by federal agents without a search warrant. The dispute centers on the location of the whiskey. It was found in wooded area on land owned by Appellant Grimes and behind a house which he occupied. The question presented is whether this location was within the curtilage of his home. The District Court considered the matter on his Motion to Suppress. His factual determination that the whiskey was outside the curtilage is not clearly erroneous."

Upon question involved, if factual determination is not clearly erroneous then error exists and petitioner should have benefit of the doubt and be acquitted and discharged by the Court. The factual determination upon Motion to Suppress is either erroneous or not error.

QUESTION 2.

Relating to Motion to Dismiss Indictment and abate Trial by Jury.

Did the Court of Appeals err in holding, deciding and affirming the judgment of the District Court in denying petitioner's Motion to Dismiss the Indictment and the Motion to Abate the Petit Jury where the District Court Judge had by his order (R. pp. 83, 84) revised and changed the entire procedural method of choosing and selecting jurors (Both grand and petit) for the Middle District of Georgia, Macon Division, by directing and ordering the Clerk and Jury Commissioner to revise the jury box with names selected at random from the voters' registration list and not from any other source.

QUESTION 3.

In this same connection did the Court of Appeals err in affirming the judgment of the District Court in this case that selection of jurors at random solely from the voters' registration list conform and comply with the decision and ruling of the Court of Appeals for the Fifth Circuit in the case of Rabinowitz and Jackson vs. United States, 366 Fed. 2nd, 35.

QUESTION 4.

In this same connection, did the Court of Appeals err in affirming the judgment of the District Court in the case and

holding and deciding that the selection of jurors at random solely from the voters' registration list was in full compliance with 28 USC 1861, et seq. and not in violation of the above statute and the jurors chosen in such manner represented a true cross section of the community as required by law.

QUESTION 5.

Further, did the Court of Appeals err in failing to hold in this case that the selection of jurors chose in such manner as provided by order of District Judge (R. 83, 84) constituted a violation of 28 USC 1861, et seq. by adding and making a new qualification to becoming a federal juror, i.e., the person must be a registered voter and his name on the voters' registration list. This qualification and requirement in order to be a federal juror adds a new qualification for becoming a juror and is not provided for under Section 28 USC 1861.

QUESTION 6.

Further, did the Court of Appeals err in this same connection in failing to hold, and by affirming the judgment of the District Court and holding that the Order of the District Court, in this case, did not constitute an invasion of the powers of Congress of the United States itself and not being within the powers of the judiciary.

QUESTION 7.

Did the Court of Appeals in this same connection err in holding and affirming the judgment of the District Court in this case that the selection of jurors at random from the voters' registration list complied fully with 28 USC 1861 and met the acid test of being a true cross section of the community with strict emphasis provided for the intelligence test as provided by 28 USC 1861 among other requirements to become a federal juror. This section provided that the juror be able to read, write, speak and understand the English language.

QUESTION 8.

Further, did the Court of Appeals err in affirming the judgment of the District Court in this case by holding and deciding that a group of persons who have not registered to vote have never been considered to constitute a "cognizable" group of persons. Relating to this question in Question 2, all citizens not on the voters' list are systematically excluded by the Clerk and Jury Commissioner and according to their own admission more than 62,523 citizens of the District involved here are excluded and denied the opportunity or chance of becoming a federal juror. (R. 72, 73, 74, 75.)

STATUTES INVOLVED

28 USCA, Section 1254(1)

28 USCA, Section 1861 et seq.

STATEMENT OF THE CASE

Petitioners, Noah Grimes and Alice Thomas Pearson, both of the colored race, were charged in a one-count indictment with possession of contraband whiskey on April 11, 1966, to-wit, six and one-sixteenth (6 1/16) gallons of whiskey in the United States District Court for the Middle District of Georgia, Macon Division. Petitioners pleaded not guilty on October 25, 1966. Before arraignment, Petitioner Noah Grimes filed his Motion to Suppress the Evidence and Petitioners Noah Grimes and Alice Thomas Pearson filed the Motions to Dismiss the Indictment and Motion to Abate the Trial by Jury. The Motion to dismiss the Indictment and Motion to Abate Jury Trial complained that the method, manner and procedure used by the Clerk and Jury Commissioner in selecting, drawing and summoning jurors serving in said District violated the statutory scheme for the selection of jurors, 28 USCA 1861, that an adequate investigation was not made by the officials to ascertain that said jurors could read, write and understand the English language and did not represent a true cross section of the community. Both motions at a hearing were denied by the Court. The Motion to Suppress was based upon the ground that the search and seizure and arrest were illegal and in violation of petitioner's Constitutional rights, and that the evidence

upon which the government agent relied was seized from within the curtilage of his home and without a search warrant or arrest warrant and in violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States and was seized against his will and said evidence was obtained as a result of an unlawful search and seizure and should be suppressed. The Court denied the Motion to Suppress on November 9, 1966.

The trial was continued by the Court until November 16, 1966 and again until April 18, 1967 at which time trial began before a jury resulting in a conviction of the petitioners on April 20, 1967.

An appeal was had and judgment affirmed by the Court on March 20, 1968. Motion for rehearing was denied on April 12, 1968. Motion for Stay of Mandate was granted extending time for filing this petition for writ of certiorari to this Honorable Court.

STATEMENT OF FACTS

Petitioner Grimes in his Motion to Suppress alleged that the contraband whiskey was seized from his premises within the curtilage of his home in the absence of a search warrant or arrest warrant by Agents W. W. Williams and Roger M. Brown. Ample time and opportunity, the record discloses, as stated before, for agents to have secured a search warrant. The record

discloses that on or about 10:30 in the morning on April 11, 1966, Agents, acting upon information received the week before that Grimes was stashing whiskey back of his home, went on his premises from back of his home and found non-tax-paid whiskey in a ditch within the curtilage of his home. At that time, the agents did not make arrest but left and went back to the scene on the same day in the afternoon and arrested petitioner. Agents admitted they had no search warrant or arrest warrant. (R. p. 27) They further admitted that they had time to have secured warrants if they so desired. (R. 32).

Further, Agent Williams shows that the whiskey was found within the curtilage of his home. (R. 58.)

The Motion to Dismiss the Indictment and Motion to Abate the Trial Jury was brought about in this case by the entire procedural method of choosing and selection of the jurors in the United States District Court for the Middle District of Georgia, Macon Division being set aside by the ruling of the Court of Appeals (Fifth Circuit) in the Rabinowitz and Jackson case (366 Fed. 2nd, 35), on July 20, 1966, in that the whole jury system failed to comply with 28 USCA 1861, et seq. This ruling brought forth the order of the Trial Judge that we now complain of. The order, dated August 5, 1968, directed the Clerk and Jury Commissioner to revise the jury box with the names selected at random from the voters' registration list. Petitioners were tried by

jurors obtained in this manner. This procedure of selection of jurors under the order of the Court were complained of in the Court of Appeals and complained of now that the same did not conform and comply with USCA 28-1861, nor with the ruling in the Rabinowitz and Jackson case supra, and other rulings of this Honorable Court in that it did not represent a true cross section of the community and that the ruling of the Court allowed to stand by affirming the judgment of the lower Court an order that set up a new qualification not provided in USCA Section 1861 for becoming a federal juror, i.e., he or she must be a registered voter. (R.83, 84) Under 28 USC 1861, the Congress of the United States definitely provided the qualifications necessary to become a federal juror and not one of these provisions require a person to be on the voters' registration list in order to become a federal juror. The question of race, creed or color should be unimportant in the jury selection for a determination of rights among people in the Court of Justice. The uppermost question being that the selection represented a true cross section of the community that meets the test of USCA 28-1861, in all of its senses with emphasis given to intelligence and educational qualifications as required by USCA 28-1861. Among other qualifications the statute provided that jurors must be able to read, write and speak and understand the English language. Procedure in any Court is not exactly clear to any layman and sometimes not

clear to lawyers and for jurors to understand the English language some education should be required or considered by the jury Commission and Clerk before the jurors being their duties in the administration of justice between litigants. This phase in the selection of jurors is demanded under Sec. 28, U.S.C.A. 1861 when Congress made one of the requirements that jurors (understand the English language) This is not a dead letter in the requirements of U.S. Code 1861. The ruling of the Court of Appeals is in conflict with the requirement of this Section. (Sec. 28, U.S.C.A. 1861). The District Court ignored this requirement in its order setting up a new jury system, as well the Court of Appeals in affirming the Judgment. The ruling of the Court of Appeals is constitutionally defective. The question here is important to all litigants, and should be considered by this court and corrected.

Understanding the English language is the educational test required by the Act of Congress. The record discloses that the Clerk of the District Court for the Macon Division was ordered to mail questionnaires to the jurors chosen from the voters' registration list and the questions propounded in the questionnaire were the qualifications set forth in 28 USCA 1861 and the jurors were ordered to answer the questionnaire and return it to him. No question relating to any schooling were asked. No interviews were had by the Clerk and Jury Commissioner with the prospective jurors.

The grand and petit jurors upon their appearance in Court for the trial of a case should be presumed to be qualified to serve. The record discloses petitioner's trial was not the case. The Trial Judge departed from his many other duties and sought to determine in open court if the jurors chosen met the statutory qualifications under USCA 28-1861 a practice followed at each term of court thereafter. (See R. 98-99 and Movant's Exhibit No. 5 for questions propounded by the Court and answered as follows:

"October 24, 1966

"THE COURT: Members of the jury, there is a statute of the United States with reference to the qualification of jurors which says:

"'Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a Grand or Petit Juror unless,'

and there are three disqualifications:

"'(1) He has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.'

"So, let me ask, has any one of you ever been convicted in a court of record of a crime punishable by imprisonment for more than one year? If so, please rise.
(No response.)

"'(2) He is unable to read, write or speak and understand the English language.'

"Is there anyone here among you summoned jurors who is unable to read, write and understand the English language? If so, please rise.

"JUROR: I don't know whether I'll be able to do what you say all the time, but I'll try to. I ain't too good on it.

"THE COURT: Give us your name, please sir.

"JUROR: Gordon Screws. Third grade to the fourth is as far as I went.

"THE COURT: Went up through the third grade and entered the fourth?

"JUROR: Entered the fourth but I didn't never go in the fourth.

"THE COURT: Do you read the newspapers?

"JURORS: I don't fool with newspaper reading much, very much, hardly.

"THE COURT: What is your occupation?

"JUROR: State Highway Department, No. 2 Division.

"THE COURT: What work do you do for them?

"JUROR: Well, I operate a tractor.

"THE COURT: All right sir, Much obliged to you for this information and the attorneys present will remember it. Thank you so very much, sir.

"Now, of course, this business of understanding the English language, I take it all of us are allowed a little latitude in answering that because sometimes I wonder if I understand it. I do my best. Sometimes it is difficult to understand the English language. It's according to who is writing it and what he is trying to say and how he says it. Sometimes I try to read something that is not made very clear to me. I find that even in court decisions it is hard to understand exactly what they are talking about. But I think I can qualify under this section.

"'(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service.'

"Well, are any of you suffering under any mental deficiencies or

physical infirmities? That goes to the question of hearing, I take it, and seeing. At least those two things. Physical infirmities rendering it impossible for you to render efficient jury service. If you are disqualified under that section, please rise.

"JUROR: I have high blood pressure and dizziness, Your Honor. I'm Clyde J. Green.

"THE COURT: Mr. Green? You have high blood pressure and dizziness?

"MR. GREEN: Yes, sir.

"THE COURT: Would you feel able to sit on a case that might take all day to try, or two days or longer? How do you feel about that?

"MR. GREEN: Well, it would be pretty hard on me.

"THE COURT: You are dizzy sometimes?

"MR. GREEN: Yes sir.

"THE COURT: Mr. Clerk, excuse Mr. Green.

"JUROR: Sir, I am under the doctor's care now. I have bronchial trouble. I'm George L. McBroom.

"THE COURT: Well, emphysema? Of

course, I have known some people who have gone right along with that. It's not a good thing.

"MR. McBROOM: Sometimes it doesn't bother me too bad and at times it does.

"THE COURT: Do you work every day, eight hours a day?

"MR. McBROOM: About every day, yes sir.

"THE COURT: Well, I suppose this work won't be any harder than that, will it?

"MR. McBROOM: I don't think so.

"JUROR: If Your Honor please, I don't know whether this would come under the head of mental or not. I had a nervous breakdown or something over a year ago and was in the hospital about a month, but I have been doing all my regular duties, teaching the Bible class at the church and have returned to society and my doctor says that I am cured. I just wanted to know if I come under that heading or not.

"THE COURT: What is your name, sir?

"JUROR: William M. Towles.

"THE COURT: All right, sir. You are back at your regular work now?

"MR. TOWLES: Yes sir.

"THE COURT: All right, sir. Thank you for that information.

"JUROR: My case is the same. I was admitted to the psychiatric ward in January and I feel like I am able to serve but I thought this information would be---

"THE COURT: What is your name, sir?

"JUROR: Salvatore Cucci.

"THE COURT: Where do you live, sir?

"MR. CUCCI: Macon.

"THE COURT: You say you were admitted to the psychiatric ward?

"MR. CUCCI: Yes sir, I spent approximately a month there.

"THE COURT: How long ago was that?

"MR. CUCCI: January of this year.

"THE COURT: I think I will excuse you, Mr. Cucci, so I'll be perfectly safe on it. Any others? Now, call those that came in late, Mr. Clerk. (Three Jurors called. Same three questions put to them and no response forthcoming.)

******

"Above questions were put to the petit jurors for the October term and to the grand jurors at the same time. Mr. Screws and Mr. Towles were Grand Jurors and Mr. Green, Mr. McBroom and Mr. Cucci were Petit Jurors."

We respectfully contended that jury service is a privilege and not a legal right. The true concept of jury privilege looks to the educational theory as well as other things under the statute. There is a vast difference between the right to be on a voter's list and the right to become a federal juror.

REASONS FOR GRANTING A WRIT OF CERTIORARI

1.

The decision of the Court below is not in conformity and in conflict with the case of Taylor vs. United States, 286 US 466. In this case, this Honorable Court held that the garage adjacent to the defendant's residence was searched and contraband liquor found and this Court held that search and arrest was illegal. This Court held in the Taylor case, supra:

> "The purpose was to secure evidence to support some further arrest."

Further this Court decided in Headnote No. 7 in the Taylor case, supra:

"A search of the garage and seizure of whiskey without warrant after officers smelled whiskey odor and saw card board cases through small openings held unreasonable. (Const. Amend. 14)"
Search and seizure made by prohibition agents were unreasonable and evidence obtained should have been suppressed, facts disclosing that garage was situated adjacent to and on the said premises as defendants dwelling; that search was made 2:30 a.m. and that no one was within garage and there was no reason to think otherwise---over a considerable period, numerous complaints concerning use of premises had been received but agents had made no effort to obtain, although having abundant opportunity so to do and to proceed in orderly way even after odor had emphasized their suspicion."

The decision of the Court of Appeals is in conflict with the case of Walker vs. United States 225 Fed. 2nd (5) 447. The Walker case, supra, is directly applicable and germaine to the facts and law as to the case at bar. The Court of Appeals held as follows in Walker, supra:

"Barn was part of owner's curtilage and was within the protection against unreasonable searches and seizures though seventy to eighty yards from house and separated from house by a

private driveway and was surrounded by a fence in which a gap allowed entrance into barnyard from driveway at the front of the house."

In the above case, Walker, supra, the barn was 70-80 yards (240 feet) from Appellant's home. Court of Appeals held this to be within the curtilage. In the case at bar, the whiskey was found 70 yards (210 feet) from Grimes' home. The garage of Grimes was 40 yards (120 feet) below where the whiskey was found.

The ruling of the Court of Appeals is in conflict with the opinion of the same Court of Appeals in the case of Walker vs. United States 125 Fed. 2nd(5) 395, and Walker 225 F. 2d 5th. 447. The ruling of the Court of Appeals is in conflict with the decision of another Court of Appeals in the case of Wakkuri vs. United States 67 Fed. 2nd 844 and Roberson vs. United States, 165 Fed. 2d 752.

We respectfully contended that the search of that part of the petitioner's premises within the curtilage of his own home in the absence of a search warrant constitutes a violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States.

2.

The decision here is not in accord with the ruling of the Court of Appeals itself in the case of Rabinowitz and Jackson 366 Fed. 2nd 35, as stated by

Judge Brown in the concurring opinion as follows:

> "In today's society of intense public education a fair cross section is not afforded unless the system pursued fairly produced a balanced, literate intelligence spectrum."

and in this same connection, Judge Brown said:

> "Judge Bell is most certainly this much right. The selection of a jury box in which all would barely pass the minimum literacy read and write test would inescapably be constitutionally defective."

Judge Brown stated further in the Rabinowitz decision, supra:

> "Another significant factor essential to a fair cross section is the educational background of prospective jurors. The consciously sought Blue Ribbon Jury is unacceptable for the Federal Courts. Equally so is one of marginal literates."

Thiel vs. Southern Pacific, Supra, 328 US 217-220, this Honorable Court held that for a jury panel to be invalid because of discrimination, there must be clear evidence of an intent on the part of the Jury Commissioners or Clerk or both to prevent or exclude or to devise or use a system or method of selection which is

calculated and intended by them or either to result in prevention or exclusion of any person or group of persons from being called for jury service on account of and solely because of their membership in a cognizable class as here in case at bar.

The decision of the Court of Appeals herein is not in accord with the applicable decisions of this Court in the case Thiel vs. Southern Pacific, supra and likewise in the case of Ballard vs. United States, 329 US, 187-195. This Honorable Court held the exclusion of a cognizable class or group violates the statutory scheme and likewise in Glassner vs. United States 315 US 60, 83, 87, this Court held that the statutory scheme places one further inhibition on the jury officials. They cannot limit their selections from a given class to a specialized sub-group with particular interest within their class as choosing only from those women who are members of the League of Women Voters. It is contended here that all citizens not on the voters' list (cognizable group) were systematically excluded by the Jury Commissioner and Clerk under their own admission and in compliance with the order of the Court and more than 62, 253 citizens of Macon Division of the Middle District of Georgia were denied the chance and opportunity of becoming a federal juror. (See Movant's Exhibits 1 and 2, pp 72, 73, 74 and 75.)

Whether or not persons not on the voters' list are the cognizable class, the order of the trial judge for the Jury

Commissioner and Clerk to select jurors only from the voters' list and in the manner and means used by them in their selection after drawing the names does not meet any educational test and is not within the holdings and rulings of the Court of Appeals in Rabinowitz case, supra.

One week chain in the selection of prospective jurors by the Jury Commissioner and Clerk has been a failure to give full credence, weight, study and thought as to the statutory qualifications (understanding the English language) and choosing jurors from a true cross section. Omission of either or both, we urge, renders the right of trial by jury an empty right, and abolition of a jury trial in the true sense. The decision and holdings of the Court of Appeals in affirming the judgment of the Court below is in conflict with 28 USCA 1861, et seq. in that the order of the trial judge set up and enacted a new qualification for jury service, not provided by Congress, i.e., persons must be on the voters' registration list to serve on federal juries. Under the ruling of the Court of Appeals, the Court permits the judiciary to enact legislation clearly and solely and within the province of the Congress of the United States.

The decision of the Court of Appeals is in conflict with the ruling in the case of Rabinowitz, supra, in that selection of names for jury service solely from voters' list or solely on any other list, where many lists are available denies a fair cross section.

WRIT OF CERTIORARI

Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon petition of any party to any civil or criminal cases, before or after rendition of judgment of decree. June 25th, 1948 c 646, 62 Stat. 928, 28 U.S. Code Section 1254(1)

The opinion and judgment of the Honorable Court below, if permitted to stand, will result in prejudice to the substantial rights of petitioner and to other persons whose cases might be decided in a similar way, contrary as we believe, to the decisions of this Court, and we believe that the Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court, and the decision of the Court of Appeals is further in conflict with the decision of this court.

CONCLUSION

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

Respectfully submitted,

Counsel for Petitioner.

P.O. Address:
204 Southern United Building
Macon, Georgia

UNITED STATES OF AMERICA

GEORGIA, BIBB COUNTY:

This is to certify that I have, this ___ day of May, 1968, caused to have been transmitted by due course of mail, properly stamped, and by air mail, properly stamped and addressed a printed copy of this petition for Writ of Certiorari to the Honorable Erwin N. Griswold, Solicitor General of the United States, to his office in the Department of Justice at Ninth and Constitution Avenue, N. W., Washington, D.C. as provided by Rule 33, Section (B) and that I further certify that I have mailed, properly stamped and addressed a copy of this petition for Writ of Certiorari to the Honorable Floyd M. Buford, District Attorney and the Honorable Walker P. Johnson, Assistant United States District Attorney for the Middle District of Georgia to their Post Office Address, Room 303 in the United States Post Office Building, at Macon, Georgia, as counsel for Respondent, the United States of America.

This the _____day of May, 1968.

_____

W. O. COOPER, JR.
Counsel for Petitioners

P.O. Address:
204 Southern United Building
Macon, Georgia

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1429

NOAH GRIMES AND ALICE THOMAS PEARSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 2–4) is reported at 391 F. 2d 709.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1968. A petition for rehearing was denied on April 12, 1968. On May 13, 1968, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

809-022—68

QUESTIONS PRESENTED

1. Whether the seizure of liquor stored in a ditch near a road accessible to the public violated Fourth Amendment rights.

2. Whether the practice of obtaining names of prospective jurors from voter registration lists, with information as to relevant qualifications obtained by a questionnaire and by further questioning by the trial judge, complies with 28 U.S.C. 1861.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioners were convicted of unlawful possession of untaxed whiskey (26 U.S.C. 5205(a)(2) and 5604(a)). On April 28, 1967, petitioner Grimes was sentenced to two years' imprisonment and petitioner Pearson received twelve months' probation.

1. The evidence showed that on April 11, 1966, two agents of the Alcohol and Tobacco Tax Division, acting on "reliable information" (R. 121), found that untaxed whiskey covered with straw was stored in a ditch seventy-five to one hundred yards from the home of petitioner Grimes (R. 34, 126–131). The ditch was in a wooded location (R. 49), dense with underbrush (R. 55), and separated from Grimes' garden by a private road. The road made a "horseshoe" or "horse leg" turn (R. 34) and led to a garage one hundred and ten yards from the house (R. 48). Grimes owned this land (R. 17).

The agents commenced surveillance of the area, and later that day they saw petitioner Grimes remove

empty jugs from a car, place them in a wheelbarrow (R. 59, 121, 166–167), and drive to the spot where the whiskey was stored, where another vehicle was also parked (R. 29, 41). Petitioner Grimes remained behind the two cars (R. 169) and was not seen in possession of the whiskey (R. 189), but an agent was able to see him handling jugs between the two cars (R. 167). Petitioner Pearson then arrived and Grimes went to his house (R. 170). Pearson was seen placing two half-gallon jugs of whiskey (R. 170) into the car which Grimes had driven to the storage location (R. 31). She and Grimes were then arrested (R. 170, 194).

The liquor which had been discovered on the first inspection was still in place when the surveillance commenced (R. 157). After the arrests, it was observed that some of the whiskey had been removed and that untaxed whiskey was near the two cars (R. 159). The whiskey was then seized (R. 122, 149, 170–172).

2. In the district where petitioners were tried, current voter registration lists of the eighteen counties making up the district were used in order to obtain the names of potential jurors (R. 67, 70). From these lists an aleatory (R. 112) or random method of selection was used in order to determine which registrants would receive questionnaires designed to determine their qualifications as jurors. The questionnaires were utilized to create a pool of approximately 2400 apparently qualified jurors (R. 96). In one group of fifty-three jurors it was found that twenty-seven occupa-

tions were represented, from bank officer to laborer (R. 109).

The trial judge made inquiry of those potential jurors who were summoned, to ascertain their statutory qualifications. This resulted in the disclosures by some prospective jurors that they had only limited education or had histories of physical or emotional difficulties necessitating care or hospitalization for some weeks (Pet. 18–24). Because of such disclosures two veniremen were in fact excused by the trial judge (Pet. 21, 23).

ARGUMENT

1. Petitioners attack the seizure of the liquor following their arrest on the ground that the agents had time to obtain a warrant after they first observed the liquor in the ditch, and should have done so. The seizure, however, was made incident to the arrest of petitioners, and was, therefore, reasonable. *United States* v. *Rabinowitz,* 339 U.S. 56. There was no search, but merely the taking of articles readily apparent at the time of the arrest. *Ker* v. *California,* 374 U.S. 23, 36–37; *United States* v. *Barone,* 330 F. 2d 543 (C.A. 2), certiorari denied, 377 U.S. 1004.

Since the seizure was incident to arrest, the question of whether the ditch was in the "curtilage" of the house is relevant only with respect to whether the initial discovery of the liquor constituted a violation of the Fourth Amendment rights of petitioner Grimes. The district court, with the agreement of the court of appeals (Pet. 3), found as a fact that since the ditch was in the woods between the house

and the garage, beside a dirt road which led from the street to the garage (R. 25), the agents' activity took place beyond the curtilage. This conclusion is correct. A witness called by petitioners at trial testified that the dirt road, and a field road beyond it, were accessible to and used by the public (R. 203–205). The examination of the whiskey thus falls within the doctrine of *Hester* v. *United States,* 265 U.S. 57, that observations in the course of a simple trespass on open fields do not violate the Fourth Amendment.

2. Petitioners also contend that the list from which the array of jurors was chosen was at the same time both too restrictive and insufficiently discriminating. They argue that the exclusive use of a voter registration list as the source of jurors excluded a cognizable class—nonvoters—and that, in addition, the quality of some potential jurors whose names were obtained from the voter list was sub-standard (Pet. 24).

The use of voter registration lists as the source of names for prospective jurors is permissible. *Chance* v. *United States,* 322 F. 2d 201, 203 (C.A. 5) certiorari denied, 370 U.S. 823; *Gorin* v. *United States,* 313 F. 2d 641 (C.A. 1), certiorari denied, 374 U.S. 829; see *United States* v. *Greenberg,* 200 F. Supp. 382 (S.D. N.Y.). Indeed the statute recently enacted by Congress, Public Law 90–274, 82 Stat. 53, contemplates the use of voting lists as the primary source for names of prospective jurors, to be supplemented only when necessary to assure fairness. See 28 U.S.C. 1863(b)(2) as amended by that statute. Petitioners do not contend that the current voting lists are discriminatory as to

race, creed, or social or economic group. The use of voting lists does not amount to the unlawful exclusion of a "class" of nonvoters or impose the status of elector as an additional qualification for service. Non-electors, "united only in disinterest" (*United States* v. *Greenberg, supra* at p. 391), have never been thought to constitute a cognizable class. See cases cited *supra*. The voter registration lists were used in this case after the decision in *Rabinowitz* v. *United States,* 366 F. 2d 34 (C.A. 5), abolishing the former practice of using "key men" in selecting potential jurors, because such lists were considered to be the best available source of names constituting a cross-section of the community. That jury service is thereby limited to electors is an incidental result. It does not establish an additional qualification for jury service since no adult citizen is thereby barred from eligibility for service.

Petitioners advance the further argument that the jury list was compiled unlawfully because there was insufficient assurance that prospective jurors could read and write, as required by 28 U.S.C. 1861(2). While it is true that the clerk and commissioner did not personally interview each prospective juror (Pet. 17), there is no provision requiring personal interviews. The questionnaires that were sent did inquire about all the statutory requirements, including ability to read and write the English language. That procedure was clearly adequate. See *Chance* v. *United States, supra* at p. 206. The ultimate determination as to the qualification of particular jurors was then made

on the basis of additional questioning by the judge when the jurors were summoned for actual duty.[1]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
EDWARD FENIG,
Attorneys.

JUNE 1968.

[1] The fact that one grand juror completed only the third grade of schooling (Pet. 19, 24) is not necessarily disqualifying. See *States* v. *Dreher*, 166 La. 924, 118 So. 85, 94, certiorari denied, 278 U.S. 641.

U.S. GOVERNMENT PRINTING OFFICE: 1968